UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 129

Docket No. SF-0353-09-0559-I-1

Linda C. Chen,

Appellant,

v.

United States Postal Service,

Agency.

July 8, 2010

Neil Chen, San Gabriel, California, for the appellant.

Afshin Miraly, Esquire, Long Beach, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that denied her request for restoration as a partially recovered employee. For the reasons set forth below, we DENY the petition for failure to meet the Board's review criteria under 5 C.F.R. § 1201.115(d), REOPEN the appeal on the Board's own motion under 5 C.F.R. § 1201.118, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is PS-06 Mail Processing Clerk at the Pasadena, California, Processing and Distribution Center (P&DC) in the agency's Sierra Coastal District. Initial Appeal File (IAF), Tab 1 at 3; Tab 7, Exhibit (Ex.) 13 at 2; Tab 20 at 55. She incurred injuries to her right arm, shoulder, and neck in 1997 and 1999, which the Office of Workers' Compensation Programs determined to be compensable. IAF, Tab 7, Exs. 2-7. At the latest, by May 23, 2008, the appellant had permanent restrictions of lifting no more than 10 pounds, using her right hand and arm for no more than 30 minutes per hour, and no overhead reaching on the right. *Id.*, Ex. 11. On February 21, 2007, the appellant accepted a limited duty[1] assignment performing General Clerk duties. *Id.*, Tab 7, Ex. 9. Her duties included filing, answering the telephone and other clerical tasks. *Id.*, Exs. 9, 19; Tab 29, Ex. 6.

¶3 On April 9, 2009, the agency issued a letter to the appellant in which it informed her that there was no operationally necessary work available within her medical restrictions during her tour of duty at her facility. IAF, Tab 7, Ex. 17. The letter further stated that the appellant should leave work and not return until further notice. *Id.* The agency stated that it was taking this action pursuant to its National Reassessment Process (NRP) 2 Pilot Program. *Id.* The NRP is an initiative to provide updated and operationally necessary tasks to limited duty employees who have reached maximum medical improvement. IAF, Tab 18 at 7.

¶4 This appeal followed in which the appellant alleged that the agency violated her right to restoration. *Id.*, Tab 1 at 4. She also alleged that the agency's action constituted disability discrimination. *Id.*, Tab 1 at 5. The

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[1] In the U.S. Postal Service, "limited duty" refers to modified work provided to employees who have medical restrictions due to work-related injuries, whereas "light duty" refers to modified work provided to employees who have medical restrictions due to nonwork-related injuries. *Simonton v. U.S. Postal Service*, 85 M.S.P.R. 189, ¶ 8 (2000).

administrative judge determined that the appellant made nonfrivolous allegations satisfying the jurisdictional criteria for a restoration claim as a partially recovered individual and therefore denied the agency's motion to dismiss the appeal for lack of jurisdiction. *Id.*, Tab 26 at 7; Tab 34 at 9-10.

¶5 After a hearing, the administrative judge issued an initial decision that held the appellant did not prove her restoration claim and, therefore, denied her appeal. IAF, Tab 38 at 14-17. The administrative judge rejected the appellant's contention that the NRP was an arbitrary and capricious exercise of the agency's management authority and that the agency lacked the authority to review whether tasks performed by limited duty employees were operationally necessary. *Id.* at 15-16. The administrative judge also found that while the agency had completed a search for work for the appellant only at the facility level at the time it sent her home, a district-wide search was undertaken and was completed by July 2009. *Id.* at 17; *see also id.*, Tab 20, Ex. F; Tab 29, Exs. 2, 3; Tab 30, Ex. M. The administrative judge found that this delay in completing the district-wide search for work for the appellant until July 2009 was not arbitrary and capricious. *Id.*, Tab 38 at 17. The administrative judge rejected the appellant's contention that the NRP constituted a reduction-in-force (RIF) and held that the appellant, in any case, had no Board appeal right regarding a RIF because she is not preference eligible. *Id.* at 16. Further, the administrative judge found that the appellant did not prove her claim of disability discrimination. *Id.* at 17-19.

¶6 The appellant filed a petition for review (PFR) in which she asserts that the administrative judge erred in finding that the agency's use of the operationally necessary criterion was not arbitrary and capricious, in finding that she was not subjected to a RIF, and in finding that she was not subjected to disability discrimination. PFR File, Tab 1. The agency did not respond to the PFR.

ANALYSIS

¶7 The Federal Employees' Compensation Act and its implementing regulations at 5 C.F.R. part 353 provide that federal employees who suffer compensable injuries enjoy certain rights to be restored to their previous or comparable positions. 5 U.S.C. § 8151; *Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1015 (Fed. Cir. 2002); *Tat v. U.S. Postal Service*, 109 M.S.P.R. 562, ¶ 9 (2008). In the case of a partially recovered employee[2], i.e., one who cannot resume the full range of regular duties but has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements, an agency must make every effort to restore the individual to a position within her medical restrictions and within the local commuting area. *Delalat v. Department of the Air Force*, 103 M.S.P.R. 448, ¶ 17 (2006); 5 C.F.R. §§ 353.102, 353.301(d).

¶8 "An individual who is partially recovered from a compensable injury may appeal to the MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration." 5 C.F.R. § 353.304(c). To establish Board jurisdiction over a restoration claim as a partially recovered employee, the appellant must make a nonfrivolous allegation that: (1) She was absent from her position due to a compensable injury; (2) she recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of her; (3) the agency denied her request for restoration; and (4) the agency's denial was "arbitrary and capricious." *Chen v. U.S. Postal Service*,

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[2] It appears that the conditions underlying the appellant's medical restrictions may be "permanent and stationary," and that the appellant is therefore "physically disqualified" as that term is defined under 5 C.F.R. § 353.102. IAF, Tab 17, Subtab 12. However, because more than 1 year has passed since the appellant was first eligible for workers' compensation, she is entitled to the restoration rights of a partially recovered employee. *See Kravitz v. Department of the Navy*, 104 M.S.P.R. 483, ¶ 5 (2007); 5 C.F.R. § 353.301(c), (d).

97 M.S.P.R. 527, ¶ 13 (2004); *see* 5 C.F.R. § 353.304(c). Discontinuation of a limited duty position may constitute a denial of restoration for purposes of Board jurisdiction under 5 C.F.R. part 353. *Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007). The appellant bears the burden of proving the merits of her restoration claim, i.e., all four of the above elements, by a preponderance of the evidence. *Smith v. U.S. Postal Service*, 113 M.S.P.R. 1, ¶¶ 5-6 (2009) (citing *Hardy v. U.S. Postal Service*, 104 M.S.P.R. 387, ¶ 17, *aff'd*, 250 F. App'x 332 (Fed. Cir. 2007)).

Arbitrary and Capricious Criterion

¶9 As noted above, the administrative judge held that the appellant proved the first three criteria, but not the fourth. IAF, Tab 38 at 14-17. We agree with the administrative judge regarding the first three criteria, but are remanding for additional evidence as to the fourth, i.e., whether the agency's action was arbitrary and capricious.

¶10 As an initial matter, we find that the administrative judge properly found that the agency has authority to determine if tasks are operationally necessary. This is consistent with Board case law. In *Ancheta v. Office of Personnel Management*, 95 M.S.P.R. 343, ¶ 11 (2003), the Board stated that, pursuant to a Postal Service Employee and Labor Relations Manual, a limited duty assignment is "determined based on whether adequate 'work' or 'duties' are available" within the employee's restrictions, craft and current facility or at a different facility if there is no work at her own. That is, "limited duty or rehabilitation assignments of current employees are dependent on the extent to which adequate 'work' exists within the employees' work limitation tolerances." *Id.*; *see also Okleson v. U.S. Postal Service*, 90 M.S.P.R. 415, ¶ 11 (2001) (duties assigned to those in a limited duty capacity "often do not constitute an actual position, but are made up of work available that meets the employee's restrictions"). Further, it is axiomatic that an agency must determine what work is necessary and available to accomplish its mission. The appellant's argument that she was entitled to work in

her limited duty position regardless of whether her duties were operationally necessary is without merit.[3]

¶11 The administrative judge also properly held that the delay between the time the appellant was placed off work and the agency completed its district-wide search for work for the appellant was not arbitrary and capricious. An agency's delay when work is clearly available or when the delay is extreme and unexplained may constitute a denial of restoration. *See Hardy,* 104 M.S.P.R. 387, ¶¶ 20-21. However, in this case, the delay was not very lengthy and, during the period at issue, the agency was conducting an orderly search for work. Therefore, the delay until the agency completed its district-wide search did not render the agency's denial of restoration to the appellant arbitrary and capricious. *Cf. Hogarty v. U.S. Postal Service,* 101 M.S.P.R. 376, ¶ 11 (2006) (finding that a delay of slightly more than a month was not arbitrary and capricious where there was no evidence appropriate positions were available and the agency needed time to determine whether the appellant's reassignment was proper).

Local Commuting Area Determination

¶12 The Office of Personnel Management's (OPM) regulations provide:

> Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended.

5 C.F.R. § 353.301(d). The Board has interpreted this regulation as requiring agencies to search within the local commuting area for vacant positions to which

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[3] The administrative judge also correctly held that the agency's application of the operationally necessary criterion by itself was not arbitrary and capricious. The administrative judge found that the appellant's General Clerk duties were cobbled together from various sources, that the tasks did not need to be performed every day or constitute a full 8-hour day, and that they had been assumed by other employees. IAF, Tab 38 at 16-17.

an agency can restore a partially recovered employee and to consider her for any such vacancies. *See Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189, 193-94 (1997). "For restoration rights purposes, the local commuting area is the geographic area in which an individual lives and can reasonably be expected to travel back and forth daily to his usual duty station." *Hicks v. U.S. Postal Service*, 83 M.S.P.R. 599, ¶ 9 (1999). It includes any population center, or two or more neighboring ones, and the surrounding localities. *Sapp*, 73 M.S.P.R. at 193. The question of what constitutes a local commuting area is one of fact. The extent of a commuting area is ordinarily determined by factors such as common practice, the availability and cost of public transportation or the convenience and adequacy of highways, and the travel time required to go to and from work. *See Beardmore v. Department of Agriculture*, 761 F.2d 677, 678 (Fed. Cir. 1985) (defining "local commuting area" in the context of a reassignment).

¶13 The Board has recently found that the arbitrary and capricious criterion was met for jurisdictional purposes when the agency conducted a search for available work in the Sierra Coastal District, but it appeared that the local commuting area may include part or all of other districts. *Sanchez v. U.S. Postal Service*, 2010 MSPB 121, ¶ 14. In this case, also, the evidence shows that, at the time of the hearing, the agency's job search encompassed installations within 50 miles of the Pasadena P&DC, but only within the Sierra Coastal District. IAF, Tab 20, Ex. F; Tab 29, Exs. 2, 3; Tab 30, Ex. M; Hearing CD (HCD) 1 (testimony of Sue Golbricht, NRP Coordinator, Sierra Coastal District). The record also indicates that the agency's efforts to search for work for limited duty employees was still in process, and that it was about to undertake a search outside district boundaries in a 50-mile radius of an individual's work location. HCD 1 (testimony of Golbricht); HCD 2 (testimony of Koula Fuller, NRP Coordinator, Los Angeles District, and testimony of Linda Coffey-Harris, NRP Coordinator, Santa Ana District).

¶14 The initial decision, however, does not address the agency's obligation to consider the entire local commuting area or define the local commuting area relevant in the appellant's restoration claim. Therefore, we are remanding the appeal for supplemental proceedings and issuance of a new initial decision. On remand, the administrative judge shall oversee further development of the record by the parties on this issue, including an opportunity for discovery by the parties and a supplemental hearing. *See Sanchez*, 2010 M.S.P.R. 121, ¶ 15; *Sapp*, 73 M.S.P.R. at 193-94 (remanding the appeal for further development of the record regarding what constituted the "local commuting area" and whether the agency's job search properly encompassed that area).

Interplay with the Rehabilitation Act

¶15 As discussed above, 5 C.F.R. § 353.301(d) requires an agency to make every effort to restore a partially recovered employee to limited duty within the local commuting area. *See also Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 8 (2009). The regulation further provides that, at a minimum, this requires treating employees substantially the same as individuals protected under the Rehabilitation Act of 1973. 5 C.F.R. § 353.301(d). The relevant Rehabilitation Act standards are those applied under the Americans with Disabilities Act (ADA), set forth at 29 C.F.R. part 1630. *Smith*, 113 M.S.P.R. 1, ¶ 6; *Taylor v. Department of Homeland Security*, 107 M.S.P.R. 306, ¶ 8 (2007).[4]

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[4] ADA standards were incorporated by reference into the Rehabilitation Act and are utilized in determining whether there has been a Rehabilitation Act violation. 29 U.S.C. § 791(g); *Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 36 n.3 (2007); 29 C.F.R. § 1614.203(b). Thus, the Equal Employment Opportunity Commission's (EEOC's) regulations under the Rehabilitation Act were superseded by the ADA regulations. *Collins v. U.S. Postal Service*, 100 M.S.P.R. 332, ¶¶ 7-8 (2005); 29 C.F.R. § 1614.203(b). These regulations provide, among other things, that an agency must attempt to accommodate a covered individual after an individualized assessment of his situation and participation in an interactive process. 29 C.F.R. § 1630.2(o). We note that the recent ADA Amendments Act of 2008 did not alter the substantive requirements for reasonable accommodation, including reassignment. Pub. L. No. 110-325, § 6(h), 122 Stat. 3553 (2008), codified at 42 U.S.C. § 12201(h).

¶16 An agency's obligation to provide reasonable accommodation to an individual with a disability under the Rehabilitation Act may include reassignment to a vacant position. 42 U.S.C. § 12111(9)(B); *Smith*, 113 M.S.P.R. 1, ¶ 6; *Taylor*, 107 M.S.P.R. 306, ¶ 8; 29 C.F.R. § 1630.2(o)(2)(ii). An appropriate reassignment would be a position for which an individual is qualified by skills, experience and education and which is equivalent in terms of pay, status or other relevant factors, such as benefits and geographical location. 29 C.F.R. part 1630 Appendix, § 1630.2(o); *Equal Employment Opportunity Commission* (*EEOC*) *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (2002) (*"EEOC Enforcement Guidance"*) at 18-19.[5]

¶17 We are cognizant that, while geographical location is a consideration in determining an appropriate reassignment under the Rehabilitation Act, the reassignment obligation under the Act is not necessarily limited by the local commuting area. 29 C.F.R. § 1630.2(o)(2)(ii). "Rather, the extent to which an employer must search for a vacant position will be an issue of undue hardship." *EEOC Enforcement Guidance* at 20, Q. 27; *see also EEOC Questions and Answers: Promoting Employment of Individuals with Disabilities in the Federal Workforce* (2008) at 18, Q. 24 ("Reassignment is not limited to the facility, commuting area, sub-component, . . . or type of work to which the individual with a disability is assigned at the time the need for accommodation arises.").[6] The language in OPM's regulation at 5 C.F.R. § 353.301(d) is explicit, however, that an agency's restoration obligation is limited to the local commuting area. OPM's

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[5] One can be reassigned to the next lower level position for which he is qualified if an equivalent position is not available. *Taylor*, 107 M.S.P.R. 306, ¶ 8; *EEOC Enforcement Guidance* at 19. The *EEOC Enforcement Guidance* is available at www.eeoc.gov/policy/docs/accommodation.html.

[6] The *EEOC Questions and Answers* are available at http://www.eeoc.gov/federal/qanda-employment-with-disabilities.cfm.

intent to provide restoration rights only in the local commuting area is also clear from its explanation for adding the limiting phrase in issuing the regulation. *See* 60 Fed. Reg. 45,650 (Sept. 1, 1995) ("[Section] 353.301(d) makes clear that partially recovered employees are entitled to restoration rights only in the local commuting area, not agencywide.") [7] Therefore, we find that 5 C.F.R. § 353.301(d) requires an agency to search for a restoration assignment for partially recovered employees only in the local commuting area and that its reference to the Rehabilitation Act means that in doing so, it undertake substantially the same effort that it would exert under the Act when reassigning disabled employees within the local commuting area. By so reading the regulation, we have considered the text as a whole and given meaning to the entire text. *See Lengerich v. Department of the Interior*, 454 F.3d 1367, 1370 (Fed. Cir. 2006) ("[i]n interpreting a regulatory provision, we examine the text of the regulation as a whole"); *Phipps v. Department of Health & Human Services,* 767 F.2d 895, 897 (Fed. Cir. 1985) (examining "the true meaning and intent of the regulations read as a whole"); *compare* 5 C.F.R. § 353.301(a)-(c) (requiring agencies to consider individuals covered under those sections for placement agencywide) *with* 5 C.F.R. § 353.301(d) (requiring agencies to consider individuals covered under that section for placement within the local commuting area).

¶18 The administrative judge made no determination as to the scope of the agency's reassignment obligation under the Rehabilitation Act in the initial decision, and we do not do so here. Rather, the administrative judge should

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[7] In addition, we note that at the time OPM issued this regulation, the EEOC's regulation at 29 C.F.R. § 1614.203(g) (1994) was in effect, which limited the reassignment obligation to a funded vacant position located in the same commuting area and serviced by the same appointment authority. The substantive provisions of 29 C.F.R. § 1614.203 were superseded by the ADA regulations in 2002. *See Collins,* 100 M.S.P.R. 332, ¶¶ 7-8; 29 C.F.R. § 1614.203(b).

address this issue on remand in the context of the appellant's disability discrimination claim. *Cf. Sapp v. U.S. Postal Service*, 82 M.S.P.R. 411, ¶¶ 13-15 (1999) (finding that the appellant's restoration rights and right to reassignment under disability discrimination law are not synonymous and require separate adjudication) (clarifying *Sapp*, 73 M.S.P.R. at 194-95). The administrative judge should take into consideration the results of the interactive process required to determine an appropriate accommodation. *See Paris v. Department of the Treasury*, 104 M.S.P.R. 331, ¶ 17 (2006); 29 C.F.R. § 1630.2(o)(3); *see also EEOC Enforcement Guidance* at 6. "Both parties . . . have an obligation to assist in the search for an appropriate accommodation, and both have an obligation to act in good faith in doing so." *Collins*, 100 M.S.P.R. 332, ¶ 11 (citing *Taylor v. Phoenixville School District*, 184 F.3d 296, 312 (3rd Cir. 1999)).

Reduction-in-Force Claim

¶19 Finally, we find that the administrative judge correctly rejected the appellant's claim that she had been subjected to a RIF, because the appellant has no Board appeal rights regarding such an action. "The U.S. Postal Service is required to follow [5 C.F.R.] part 351 procedures when it releases a preference-eligible employee from his competitive level in a RIF." *Buckheit v. U.S. Postal Service*, 107 M.S.P.R. 52, ¶ 11 n.5 (2007) (citing 5 U.S.C. §§ 3501(b), 3502(a); 39 U.S.C. § 1005(a)(2); 5 C.F.R. §§ 351.201(a)(2), 351.901; *White v. U.S. Postal Service*, 63 M.S.P.R. 299, 302 (1994)). The Board's jurisdiction over RIF appeals by Postal employees is limited to appeals filed by preference eligibles. *Burger v. U.S. Postal Service*, 93 M.S.P.R. 582, ¶ 19 n.8 (2003), *aff'd sub nom. Hayes v. U.S. Posta Service*, 390 F.3d 1373 (Fed. Cir. 2004); *Marcoux v. U.S. Postal Service*, 63 M.S.P.R. 373, 380 (1994).

¶20 It is undisputed that the appellant is not a preference-eligible employee. IAF, Tab 1 at 3; Tab 7, Ex. 13 at 2. Therefore, she has no Board appeal right, even if the NRP constituted a RIF.[8]

ORDER

¶21 Accordingly, we remand the appeal to the Western Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.

[8] Because the appellant lacks a right of appeal, we need not address whether the NRP is in fact a RIF.